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IN THE

Supreme Court of the United States

October Term, 1963

No. 718

GROVE PRESS, INC., a New York corporation,
Petitioner,

vs.

RICHARD E. GERSTEIN, as State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County, and WHELAN DRUG CO., INC., a Florida corporation, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, STATE OF FLORIDA

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	3
Statute Involved	4
Statement of the Case	5
Reasons for Granting the Writ	8
Conclusion	18
Appendix A—	
Opinion of Florida District Court of Appeal	1a
Opinion of Florida District Court of Appeal (transferring cause to Florida Supreme Court)	4a
Order of Florida District Court of Appeal (transferring cause to Florida Supreme Court)	7a
Order of Florida Supreme Court (transferring cause back)	8a
Appendix B—	
Final Decree of trial court	9a
Appendix C—	
Florida Statute 847.011	12a

TABLE OF AUTHORITIES CITED

CASES:

Arnebergh v. Zeitlin ... U.S. ..., No. 584, October Term, 1963, certiorari denied, Dec. 16, 1963	10
Attorney General v. "Tropic of Cancer" 184 N.E.2d 328	11
Bantam Books v. Sullivan 372 U.S. 58	12, 16
Grove Press v. Christenberry, 276 F.2d 433	17
Jacobellis v. Ohio 371 U.S. 808	9
Kingsley Books, Inc. v. Brown 354 U.S. 436	9
Manual Enterprises v. Day 370 U.S. 478	10, 12, 13, 16

Page

Marcus v. Search Warrants of Property, etc. 367 U.S. 717 ..... 12, 16
McCauley v. Tropic of Cancer 121 N.W.2d 545 11
New Jersey v. Hudson County News Co., et al. (decided December 16, 1963) 15, 17
People v. Fritch 13 N.Y.2d 119, 192 N.E.2d 713 ..... 10, 17
People v. Richmond County News, Inc. 9 N.Y.2d 578, 175 N.E.2d 681 17
Roth v. United States, 354 U.S. 476 ..... 3, 8, 9, 10, 11, 12, 13, 15, 16
Smith v. California 361 U.S. 147 ..... 12, 16
Smith v. California 373 U.S. 901 8-9
Smith v. California ... U.S. ..., No. 72, October Term, 1963, Decided December 16, 1963 ..... 12, 16
Sunshine Book Co. v. Summerfield 355 U.S. 372 .... 12, 16
Times Film Corp. v. Chicago 355 U.S. 35 ..... 12, 16
Zeitlin v. Arnebergh 31 Cal. Reptr. 800, 383 P.2d 152 ..... 6, 11, 12, 13-14

Constitutional and Statutory Provisions:

United States Constitution,
First Amendment 3, 4, 7, 8, 9-10, 14, 15, 16
Fourteenth Amendment 3, 4, 7, 8, 9-10, 14, 15, 16
Title 28, U. S. C.,
Section 1257(3) 3, 8
Florida Constitution,
Article 5, Section 4(2) 2, 3
Article 5, Section 5(3) 2
Florida Statute 847.011 ..... 2, 3, 4, 7, 8, 9

Miscellaneous:

American Law Institute Model Penal Code Proposed Official Draft 1962, re Sec. 251.4(4) 17
American Library Association, Newsletter on Intellectual Freedom, Vol. 10, No. 4 (Jan., 1962)—Vol. 12, No. 4 (July 1963) 6
2 Crosskey, Politics and the Constitution 1094-5 (1953) 15
Esquire (Sept., 1961), review, Parker 6
Indianapolis Times (June 14, 1963) 6
Kalven, The Metaphysics of the Law of Obscenity, 1960 Supreme Court Review 1 13

Page

Library Journal (June 18, 1961), review, Moon 5
Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 19, 119 (1960) 17-18
Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 19, 110-14 (1960) 15
Miami News (July, 1963), review, Shaw 5
Miller, Tropic of Cancer (1961) 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 14, 16
Milwaukee Journal (June 18, 1961), review, Cross ... 5
Minneapolis Sunday Tribune (June 25, 1961), review, Sherman 6
New York Herald Tribune (June 24, 1961), review, Dolbier 6
New York Post (June 18, 1961), review, Walker 5
New York Times (June 18, 1961), review, Moore 5-6
New York imes (August 27-December 3, 1961) 6
New York Times (Jan. 21, 1962), review, Lewis 6
Orwell, Inside the White Whale and Other Essays 131-146, 176, 184 (1940) 11
San Francisco Examiner (July 14, 1961), review, Gorm 6
Saturday Review (June 24, 1961), review, Redman .. 6
The Nation (Nov. 18, 1961), review, Southern 6
Tucson Arizona Daily Citizen (June 24, 1961), review, Barkman 6
Wallace, Age of Surrealism 184 ff. (1950) 11
Wilson, The Shores of Light 765 ff. (1952) 11

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, STATE OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of Florida, Third District, entered on September 17, 1963, in the above-entitled case.

OPINIONS BELOW

The opinion of the Florida District Court of Appeal (R. 288) is reported at 156 So.2d 537 (Adv) and is printed in Appendix A, *infra*, at page 1a. The earlier opinion of the said appellate court transferring juris-

diction to the Supreme Court of Florida, entered on May 1, 1963, is reported at 152 So.2d 177 and is printed in Appendix A, *infra*, at page 4a; the court order (R. 263) is printed in Appendix A, *infra*, at page 7a. The order of the Florida Supreme Court rejecting jurisdiction and transferring the cause back to the Florida District Court of Appeal, entered on May 30, 1963, (R. 265) is printed in Appendix A, *infra*, at page 8a. The final decree of the trial court (Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County) (R. 283) is printed as Appendix B, *infra*, at page 9a.

JURISDICTION

The final judgment of the Florida District Court of Appeal was entered on September 17, 1963 (R. 288; App. 1a, *infra*). Said court has final appellate jurisdiction of the cause under Article 5 sec. 5(3) of the Florida Constitution. Neither further appeal nor certiorari to the Florida Supreme Court is permitted under Article 5 sec. 4(2) of the Florida Constitution.[1]

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[1] Petitioner's Assignments of Error to the Florida District Court of Appeal included the unconstitutionality of the Florida obscenity statute (Fla. Stat. 847.011, App. 12a, *infra*) on its face (ground 3) as well as its unconstitutional application to the book in question (grounds 4 and 5) (R. 286). Petitioner later disclaimed and waived any appeal to the said appellate court on the ground of the unconstitutionality of the Florida statute involved, as distinguished from its application to Henry Miller's *Tropic of Cancer*; the parties entered into a stipulation affirming the disclaimer and waiver, which stipulation was recognized and approved by the Florida District Court of Appeal on January 29, 1963 (R. 264, 266, 267). Said appellate court nevertheless transferred the cause to the Florida Supreme Court (152 So.2d 177; R. 263; App. 7a, *infra*). The Florida Supreme Court retransferred the cause back to the appellate court on the ground that the validity of the statute on its

On December 9, 1963, Mr. Justice Black granted an order, on application, extending the time in which to file this petition through December 31, 1963. Jurisdiction of this Court is invoked under Title 28, United States Code, sec. 1257(3), petitioner having asserted in the courts below rights, privileges and immunities conferred by the Constitution and laws of the United States.

QUESTIONS PRESENTED

1. Whether the public distribution of *Tropic of Cancer*, a work having evident social, literary and artistic importance, may be enjoined and suppressed on the basis of a jury finding it "obscene" in a civil proceeding—consistently with the U. S. Constitution's guaranties of free expression, and whether the Constitutional rights of petitioner to publish, and the public to read, this work, were not thereby violated.

2. Whether the literary, artistic or other social importance of a book does not cloak its circulation with Constitutional protection which precludes its suppression as "obscene" under the test in *Roth* v. *United States* 354 U.S. 476.

3. Whether "hard-core" pornography only can be reached by an "obscenity" statute, under the Constitutional guarantees of free expression.

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face was no longer raised on appeal whereby the Florida Supreme Court had no jurisdiction (R. 265; App. 8a, *infra*). Thus the Florida District Court of Appeal did *not* pass upon the validity of the Florida Statute on its face so as to give the Florida Supreme Court appellate jurisdiction under Article 5, sec. 4(2) of the Florida Constitution. Similarly, as stated by the appellate court in its opinion (156 So.2d 537, 539 Adv; R. 288, 290; App. 3a, *infra*), its decision did not involve "constitutional construction" permitting appeal to the Florida Supreme Court under the same provisions of the Florida Constitution.

4. Whether Florida courts may abridge the freedom of access to a literary work, when the freedom of access to that work is expressly held not subject to abridgment by the courts of other States—consistently with the "freedom of expression" and "privileges and immunities" guarantees of the First and Fourteenth Amendments.

5. Whether the Constitutional guarantees of free expression are not violated by the application of local (Dade County), rather than national, "contemporary community standards" to the question of whether a literary work may be suppressed as "obscene".

6. Whether the courts below violated the Constitutional guarantees of "freedom of expression" and "due process" in failing to exercise their independent judgments and allowing a jury to determine conclusively and as a question of fact that the public circulation of a literary work is not protected by the Constitution but is suppressible as "obscene".

STATUTE INVOLVED

Florida Statute 847.011, Laws of Florida, 1961, c. 61-7, secs. 1-11, prohibits the publication, possession, selling, distribution, etc. of obscene books and other material. As the statute is long, it is reprinted as Appendix C, *infra*, at page 12a. Subsection 10 of the statute defines obscenity as follows:

> "(10) For the purposes of this section, the test of whether or not material is obscene is: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

STATEMENT OF THE CASE

On October 16, 1962, petitioner was permanently enjoined by the Circuit Court for Dade County, Florida, from distributing Henry Miller's *Tropic of Cancer*, pursuant to a civil progeeding whose features are described below. Petitioner is the publisher of *Tropic of Cancer* and many other novels, volumes of poetry, plays and works on science, history, criticism, art and music, including the works of established authors such as Herman Melville, Mark Twain, Henry James and D. H. Lawrence, and works by newer authors brought to the attention of the American public by petitioner, including Samuel Beckett, Brendan Behan, Bertold Brecht, Shelagh Delaney, Marguerite Duras, Eugene Ionesco, Harold Pinter, Alain Robbe-Grillet, Jean Genet and William Burroughs. Although Henry Miller had for many years been acclaimed throughout the world as a leading writer of the 20th century, largely on the basis of major works like *Tropic of Cancer*, those works had never been generally available in his native country. With the publication in 1961 of *Tropic of Cancer*, petitioner introduced to the American public the first of those works.[2]

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[2] Mr. Miller was elected to membership in the American Institute of Arts and Letters in 1958. Among the critics, writers and scholars who have noted the importance of his work have been John Ciardi, Norman Cousins, Lawrence Durrell, T. S. Eliot, Wallace Fowlies, Horace Gregory, Aldous Huxley, George Orwell, Sir Herbert Read, Karl Shapiro, Sir Osbert Sitwell and William Carlos Williams. Reviews of the suppressed book appeared in many newspapers and journals, including, *Miami News* (July, 1963—Fred Shaw) (R. 125-144); *Milwaukee Journal* (June 18, 1961—Leslie Cross), *Library Journal* (June 18, 1961—Erie Moon, ED.), *New York Post* (June 18, 1961—Gerald Walker), *New York Times Book Review* (June 18, 1961—Harry T.

Although in England *Tropic of Cancer* was on account of its literary importance this year ruled freely available for the entire country, by action of the Attorney General there, within the United States some fifty proceedings, or challenges to proceedings designed to suppress *Tropic of Cancer* from bookstores and libraries, have arisen. Many of these controversies still pend in state courts. As the California Supreme Court noted:

> ". . . in some places the book (*Tropic of Cancer*) is 'obscene' and in others it is not; presently its legal status is largely tied into the geography of its sale or publication." (*Zeitlin v. Arnebergh*, 31 Cal. Reptr. 800, 383 P.2d 152, 153 with citations to relevant cases in footnote 1.)[3]

Moore), *New York Herald Tribune* (June 24, 1961—Maurice Dolbier), *Saturday Review* (June 24, 1961—Ben Ray Redman), *Tucson Arizona Daily Citizen* (June 24, 1961—John Barkman), *Minneapolis Sunday Tribune* (June 25, 1961—John K. Sherman), *S. F. Examiner* (July 14, 1961—Lester Gorm), *Esquire* (Sept., 1961—Dorothy Parker) and *The Nation* (Nov. 18, 1961—Terry Southern). The book appeared on the *New York Times* national best seller lists from August 27, 1961 thru December 3, 1961.

[3] See also the incidents of threats, prosecutions and suppression reported in the American Library Association's Newsletter on Intellectual Freedom, Vol. 10, No. 4 (January 1962) through Vol. 12, No. 4 (July 1963). See also *New York Times Book Review* (January 21, 1962) at page 4: "The Most Recent Troubles of Tropic" by Anthony Lewis. There appear to have been 27 arrests in New Jersey alone. Other States include New York, Ohio, Minnesota, Indiana, Illinois, Colorado, Tennessee, Connecticut, Florida, Texas, Kentucky, Pennsylvania, Delaware, Washington, Oklahoma, Alabama, Iowa and Missouri. The most recent conviction occurred in Indianapolis, Indiana where Mr. Keith Cuffel, a divinity school graduate and manager of Curry's College Bookstore was found guilty of selling the book. See *Indianapolis Times* for June 14, 1963.

How the Federal Questions Arose

The federal issues sought to be reviewed arose when the respondent, Richard E. Gerstein, brought suit in the Circuit Court for Dade County seeking an injunction enjoining Whelan Drug Co. from selling and distributing Henry Miller's *Tropic of Cancer* (R. 1). On November 2, 1961, the trial court entered a temporary restraining order enjoining the book's sale, etc. (R. 5). Petitioner moved to intervene as co-defendant (R. 7), and on January 17, 1962, the petition to intervene was granted (R. 9).

Petitioner and Whelan filed their answers to the Complaint denying *inter alia* the obscenity of the book in question and raising the free expression guarantees of the First and Fourteenth Amendments to the Constitution of the United States (R. 10, 12). The trial court submitted the question of obscenity, without Constitutional instructions, to a jury of six Dade County residents who, after reading the book and hearing testimony concerning the book's literary and social importance, but restricted to "local" standards, found the book obscene (R. 13, 17-262; App. 10a, *infra*). On October 16, 1962, the trial court entered its Final Decree, finding that "Tropic of Cancer" was obscene under Fla. Stat. 847.011 and permanently enjoining its publication, dissemination, etc. within the jurisdiction of the court (R. 283; App. 9a, *infra*).

Petitioner timely and properly appealed the trial Court's Final Decree to the Florida District Court of Appeal (R. 282, 286-287, 268-281), and in numbers 4 and 5 of petitioner's Assignments of Error challenged the constitutionality, under the First and Fourteenth Amendments to the Federal Constitution, of the

Court's rulings (R. 286). Petitioner on brief and oral argument urged that the freedom of expression guarantees of the U. S. Constitution protected *Tropic of Cancer* from the action taken. Nevertheless, after the Florida Supreme Court had refused jurisdiction of the cause transferred to it by the Florida District Court of Appeal, petitioner having waived any attack on the constitutionality of Fla. Stat. 847.011 *per se* (see footnote 1, *supra*), the District Court of Appeal entered its opinion on September 17, 1963 affirming the judgment and Final Decree of the trial court banning *Tropic of Cancer* as obscene under the relevant statute. The appellate court's opinion stated *inter alia*: ". . . we consider the jury's decision conclusive on the matter." (R. 288, 290; App. 3a-4a, *infra*)

Petitioner requests this Court to issue a writ of certiorari to review the final judgment of the Florida District Court of Appeal, the highest Florida court which can render a decision in the case at bar, under Title 28, United States Code, sec. 1257 (3) in view of the substantial federal Constitutional questions presented.

REASONS FOR GRANTING THE WRIT

Florida Statute 847.011, for the suppression of "obscenity," is modeled in part after this Court's *Roth* decision. The enforcement of that Statute by the Florida courts below to suppress petitioner's distribution of an important work of literature, Henry Miller's *Tropic of Cancer*, presents several substantial federal questions either not heretofore determined by this Court, or disposed of below in a way not in accord with *Roth*. This Court, in granting the petition for writ of certiorari filed in *Smith* v. *California* 373 U.S.

901, (No. 72, October Term, 1963) and the appeal filed in *Jacobellis* v. *Ohio* 371 U.S. 808, (No. 11, October Term, 1963), recognized the importance of several of the questions raised herein. Finally, the resolution by this Court of one or more of the federal Constitutional questions here presented could serve not only to remove a direct conflict between the decisions of the highest courts of several states on an important federal Constitutional issue (See point 1, *infra*), but also to put an end to uncertain criminal and civil litigation presently pending in a considerable number of state courts (See footnote 3, *supra*).

Among the reasons why this petition should be granted is that the only decision of this Court so far appearing to have squarely faced the Constitutional validity of the enforcement *in rem* of an obscenity statute, unlike the case presented here, involved material making no claim to literary, artistic or other social importance. Nevertheless, this Court there divided 5-4 in upholding the state's suppression of material claimed to be obscene. *Kingsley Books, Inc.* v. *Brown* 354 U.S. 436. The case now before this Court in this aspect presents a federal question of substance not heretofore determined.

A related reason for the issuance of the requested writ is that this Court has not squarely ruled on whether the *Roth* test for identifying "obscenity" may Constitutionally be applied for the suppression not only of worthless matter, but literature or art having social value. This Court's *obiter dicta* in *Roth* strongly suggest that, in subjecting a book such as *Tropic of Cancer* to the "prurient interest" test, as did the courts below pursuant to Florida Statute 847.-011, Federal rights of free expression were violated

and Constitutional questions decided in a way not in accord with this Court's applicable decisions, including *Roth*. And this case touches on the question raised in *Manual Enterprises* v. *Day* 370 U.S. 478 whether "hard-core" pornography, or something less, will satisfy the Constitutional test.

This petition also involves the substantial questions not heretofore decided by this Court (but recently significantly touched on by the Supreme Court of New Jersey; see footnote 6, *infra*), of whether persons residing in one county or state can be made to enjoy a lesser freedom of expression under the Federal Constitution, than persons residing in other counties and states of the Union, and whether national rather than local community standards must apply. The highest courts of three sister states have, in construing similar statutes, effectively granted persons residing therein full right of access to literature and art, and specifically to the book *Tropic of Cancer;* this Court recently declined to review such full right of access with respect to one of those states, California. *Arnebergh* v. *Zeitlin* ... U.S. ... No. 584, October Term, 1963, certiorari denied, Dec. 16, 1963. The same questions were recently answered to the contrary, erroneously, it is submitted, by the highest court of a fourth state. *People* v. *Fritch* 13 N.Y. 2d 119, 192 N.E. 2d 713.

Another important federal question presented by this petition and not heretofore decided by this Court is whether the freedom of a work of literature to circulate publicly may be decided *conclusively* by a jury as an issue of fact, or whether it is not incumbent upon the trial and reviewing courts in such a case to exercise their *independent* judgments and take the

Constitutional issue fully into account as a question of law, or of mixed law and fact.

Each of the reasons and questions here presented, those outlined in the preceding paragraphs, and others discussed hereafter relate to the fundamental rights of free artistic expression and the freedom to read, and each of the questions is of sufficient public importance to merit plenary consideration. If this Court declines to grant the writ herein requested, the people of Florida may be left with a crippled freedom of expression and this nation's liberty with a limp.

1. *Tropic of Cancer* is a work of literature, not a piece of pornography.[4] Although found and held "obscene" after a jury trial in the Florida proceedings below, it has been found and held not obscene *because protected by the Federal Constitution*—in the highest state courts of California, Massachusetts and Wisconsin. *Zeitlin* v. *Arneberg* 31 Cal. Reptr. 800, 383 P. 2d 152, (cert. den. . . . U.S. . . Dec. 16, 1963); *Attorney General* v. *Book Named "Tropic of Cancer"* 184 N.E. 2d 328; *McCauley* v. *Tropic of Cancer* 121 N.W. 2d 545. In each proceeding there has been involved a statute drawn or applied to incorporate this Court's prescription for testing obscenity under *Roth*. These cases thus cannot be squared. Nor can the holding of the Florida courts below be

[4] Or if it is a piece of "pornography", as suggested by a majority of the New York Court of Appeals, then it is a piece to the taste of the greater American audience, over one million of whom have bought the book, and palatable as well to some of this nation's and the world's best respected literary critics. See e.g., Orwell, George, *Inside The Whale and Other Essays* (London 1940) at 131-146, 176, 184; Fowlie, Wallace, *Age of Surrealism* (1950) at 184 ff; Wilson, Edmund, *The Shores of Light* (1952) at 705 ff.

squared with this Court's noteworthy *obiter dictum* in *Roth* v. *United States* 354 U.S. 476, 487, that "The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press."[5] It is perfectly clear from the record in this case that this literature was suppressed solely because of its unconventional portrayals of sex (R. 49-55, 184-186, 211-215, 239-241, 251; App. 2a-3a, *infra*).

Roth was misunderstood and misinterpreted by the courts below so as to countenance a jury's suppressing as "obscene" not worthless matter but a literary work having evident social importance (R. 256-260; App. 2a, 3a-4a, 10a, *infra*). By contrast, the high courts of the three other states cited above have now understood and interpreted *Roth* to require the liberating of such a work from the type of constraint meant to be placed upon worthless "obscenity" or "pornography" by the laws of all States—whenever a work evidences any social worth by its literary or artistic importance.

> "Such an art-form (*Tropic of Cancer*) must be distinguished from that which is designed to excite or attract prurience; it surely does not constitute hard-core pornography . . . a legal proscription cannot, in any event constrict artistic creation." *Zeitlin* v. *Arnebergh*, *supra*, at page 166.

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[5] The holdings below appear also to be in conflict with this Court's rulings extending from *Times Film Corp.* v. *Chicago* 355 U.S. 35; *Sunshine Book Company* v. *Summerfield* 355 U.S. 372; *Smith* v. *California* 361 U.S. 147, through *Marcus* v. *Search Warrants of Property, etc.* 367 U.S. 717; *Manual Enterprises, Inc.* v. *Day* 370 U.S. 478; *Bantam Books* v. *Sullivan* 372 U.S. 58; and *Smith* v. *California* ... U.S. ... No. 72, October Term, 1963, decided December 16, 1963.

If the *Roth* "prurient interest" test (as refined by *Manual Enterprises*) may, in Florida, like New York, with impunity be applied to suppress classic literature equally with subway scrawls, *Roth* may become a bane to freedom of expression and an overture for this Nation's pressure groups, under the guise of stamping out pornography, to step up rather than leave off their regulation of the Nation's literary and artistic expression.

This case thus presents this Court with both the possibility and need to clarify *Roth's* bearing upon literature, as distinguished from obscenity. *Roth* must have been intended to insure the door barring federal and state intrusion upon freedom of expression was to be left open "only the slightest crack" necessary to permit the policing of *worthless* obscenity. (Kalven, *The Metaphysics of the Law of Obscenity*, 1960 Sup. Ct. Rev. 1). When this crack is pried so wide by courts like those below as to permit the suppression of works having undeniable importance, it would seem incumbent upon this Court to redesign or close the door. It is submitted the case at hand thus raises the very substantial federal question of whether the control of "obscenity" sanctioned by *Roth* can be used as a cover for the general censorship of books, or must be confined as a tool for the elimination of "hard-core" stuff. This Court in *Manual Enterprises* v. *Day*, *supra*, at page 489, noticed the growing pertinence, since *Roth*, of the question "whether 'hard-core' pornography, or something less . . . (is) the proper test. . . ."

As the Supreme Court of California held:

> ". . . if material is commercial obscenity or saleable pornography it is obscenity in the sense that

it is utterly without redeeming social importance; it is hard-core pornography; as such it lies outside the protective embrace of the First Amendment. If the material, however, has literary value, if it is a serious work of literature or art, then it possesses redeeming social importance and obtains the benefit of the Constitutional guarantees." *Zeitlin* v. *Arnebergh*, *supra*, at page 163.

2. The courts below countenanced the exclusion of evidence regarding *Tropic of Cancer's* literary reputation and constitutional status in other state *and* federal jurisdictions, and entirely ignored the bearing of findings on that work by sister state courts, even the highest. They also excluded such evidence of "community standards" as might have been adduced from other works available locally and nationally, and required and allowed the jury to evaluate the work's "obscenity" exclusively on the basis of local, Dade County standards (R. 105-114, 115, 143, 144, 152-156, 159, 160, 201, 218-222, 258; App. 2a, 3a-4a, 10a, *infra*). In so doing, the courts below allowed that freedom of literary and artistic expression could be clipped and pruned as suited each state or local jurisdiction, and subordinated the Constitutional guaranties of free expression to the police powers of counties and states. It is submitted that no right, privilege or immunity enjoyed by the people of the several states, and guaranteed by the Federal Constitution, may thus be randomly defined by local authorities, that petitioner ought to have as large a Constitutional right to furnish access to a book conveying ideas of importance to the people of Florida as to those of California, Wisconsin, and Massachusetts, and that the people of Florida are entitled to just as large a Constitutional right to obtain access to a book conveying ideas of importance as the

people of California, Wisconsin, and Massachusetts. (See 2 Crosskey, *Politics and The Constitution* 1094-5 (1953); Lockhart & McClure, op. cit. *infra* at 110-14).

Some guidance on this point may be afforded by the Supreme Court of New Jersey which recently confronted and decided the question squarely:

> "We are of the opinion that such a standard must necessarily be uniform throughout the nation. . . . In short, the area of expression entitled to constitutional protection cannot be broad in some parts of the country and narrow in others."[6]

The question thus involved, however, has not yet been decided by this Court; only its prompt, correct and authoritative answer will forestall the First Amendment's blanket of freedom of expression becoming a crazy-quilt sewn by myriad local censors' hands.

3. The courts below countenanced a proceeding which reduced the *Roth* test—in the case of an important work of literature—to an exploration by six men of Dade County proclivities towards prurience, shame and morbidity, itchings and longings (R. 255-258; App. 2a, 3a-4a, 10a, *infra*). It is submitted this can be no proper way for courts to measure the claim to freedom of any book, whatever may be its propriety for testing "hard-core" pornography. Aware of the claim to literary and artistic importance of the book,

[6] On December 17, 1963, the Supreme Court of New Jersey reversed criminal obscenity convictions under a New Jersey statute employing "'Roth" language because the lower courts had applied local community standards whereas the only proper standard was "the standard of the contemporary society of this country at large." *State of New Jersey* v. *Hudson County News Co. et al.* (decided December 16, 1963).

the courts below should not have foreclosed themselves from an independent judgment of the book's entitlement to protection under the First and Fourteenth Amendments (App. 2a, 3a-4a, 10a, *infra*). The courts in fact bound themselves by the jury's conclusion not even to consider this Court's warning in *Roth*, that whereas worthless expression may properly be subjected to the "prurient interest" test for the identification of "obscenity," on the other hand every expression of ideas—however hateful, controversial or unorthodox, in literature or art—must be afforded "the full protection of the guaranties."

The holding below, that the jury determination of obscenity was binding upon the Florida trial and appellate courts (App. 3a-4a, *infra*) is inconsistent with the opinion (partial concurrence, partial dissent) of Mr. Justice Harlan in *Roth* v. *United States*, *supra*, the opinion of Mr. Justice Harlan (in which Mr. Justice Stewart joined) in *Manual Enterprises, Inc.* v. *Day*, *supra*, the implicit holdings of this Court in the cases cited in footnote 5, *supra*, and the views of the highest courts of the states of California, Massachusetts, New Jersey, New York and Wisconsin.

Mr. Justice Harlan expressed the principle in the *Roth* case (at 354 U.S. 497, 498):

> ". . . if 'obscenity' is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind. . . . the Court . . . (must make) its own independent judgment upon the character of the material. . . ."

Similarly, in the *Manual Enterprises* case Mr. Justice Harlan stated the following (at 370 U.S. 488):

> "That issue (of obscenity), involving factual matters entangled in a constitutional claim, see Grove Press, Inc., v. Christenberry, 276 F.2d 433, 436, is ultimately one for this Court. The relevant materials being before us, we determine the issue for ourselves."

As stated in *People* v. *Richmond County News, Inc.*, 9 N.Y.2d 578, 175 N.E.2d 681, at 682 (and confirmed in *People v. Fritch, supra*): no court may "escape its responsibility in this area. . . .":

> ". . . if an appellate court were to rely upon and be bound by the opinion of the trier of the facts as to the obscenity of a publication it would be abdicating its role as an arbiter of constitutional issues."

Most recently, the highest court of New Jersey agreed that both the trial and appellate courts:

> "must likewise make an independent determination of whether the attacked material is suppressable within constitutional standards, for the question is not merely one of fact 'but a question of constitutional *judgment* of the most sensitive and delicate kind.' (citing authorities)" *State of New Jersey* v. *Hudson County News Company, et al.* (decided December 16, 1963).

The American Law Institute's Model Penal Code draftsmen also recognized that "the question of obscenity must be left to the independent judgment of courts". Section 251.4 (4) of the *Proposed Official Draft* 1962 provides: "The Court shall dismiss a prosecution for obscenity if it is satisfied that the material is not obscene."

Finally, as stated, by Lockhart & McClure, supported by their analysis of numerous cases:

"The importance of independent judicial review of obscenity findings for the preservation of freedom of expression is self-evident. The constitutional standards would mean little if their only effective application were by administrators like the Postmaster General, judges, or juries, who are subject to the influence of local pressures and community sentiment stirred up by propaganda groups. Neither professional government censors nor local juries are likely to be sensitive to the basic values of freedom of expression that gave rise to the constitutional standards—values that must enter into applying those standards." *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 19, 119 (1960).

CONCLUSION

For the foregoing reasons, this petition for issuance of a writ of certiorari should be granted and the judgment of the court below reversed.

Respectfully submitted.

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APPENDIX A

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
July Term, A.D. 1963

Case No. 62-710

GROVE PRESS, INC., a New York corporation, *Appellant*,

vs.

THE STATE OF FLORIDA, ex rel. RICHARD E. GERSTEIN, as State Attorney for the Eleventh Judicial Circuit of Florida, and WHELAN DRUG CO., INC., a Florida corporation, *Appellees*.

Opinion filed September 17, 1963.

An Appeal from the Circuit Court for Dade County, Harold R. Vann, Judge.

Tobias Simon, Irma Robbins Feder, Richard Yale Feder, for appellant.

Richard W. Ervin, Attorney General, and Herbert P. Benn, Assistant Attorney General, Richard E. Gerstein, State Attorney, and Joseph Durant and George Orr, Assistant State Attorneys, for State; Shapiro & Fried, for Whelan Drug Co., appellees.

Before BARKDULL, C.J., and CARROLL and HORTON, JJ.

CARROLL, Judge.

Proceeding under the Florida obscenity statute, Chapter 847, Fla. Stat., F.S.A., the state attorney sought and obtained an injunction with reference to the book "Tropic of Cancer," written by Henry Miller, restraining the defendant dealer and the intervenor, the publisher Grove

Press, Inc., from selling and distributing the book here and from bringing it into this state. The publisher answered denying obscenity and contending the statute violated state and federal constitutional guarantees of due process of law and freedom of speech. The question of the obscenity of the book under the statute was submitted to a jury which found it obscene, prompting the final decree from which the intervenor-publisher appealed.

A holding that the statute was valid made the decision one appealable to the Supreme Court.[1] In assignments of error and its brief, in addition to contending the finding of obscenity was against the weight of the evidence, the appellant challenged the chancellor's ruling on the validity of the statute and contended the statute as applied to the publication was unconstitutional. But prior to argument appellant withdrew its claim of invalidity and unconstitutionality of the statute. This court, being uncertain as to the effect of that action of the appellant upon the appellate jurisdiction of the Supreme Court, transferred the appeal to that court. The Supreme Court ruled against jurisdiction and returned the case. Thereafter, this court considered the appeal on the merits and heard argument. We now affirm the decree.

The book, "Tropic of Cancer" has been judged as to obscenity in a number of jurisdictions with differing results.[2] Generally, those courts have discussed at some

---

[1] The Florida Constitution, Art. V, § 4(2), relating to jurisdiction of the Supreme Court, provides for appeals to the Supreme Court in certain designated instances, including "from final judgments or decrees directly passing upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal constitution."

[2] See, e.g., *Zeitlin* v. *Arnebergh* (1963) 31 Cal. Reptr. 800 (and cases cited therein at 801-02, Note 1); *Attorney General* v. *Book Named "Tropic of Cancer"*, 344 Mass. ..., 184 N.E.2d 328; *People* v. *Fritch*, 38 Misc.2d 333, 236 N.Y.S.2d 706; *McCauley* v. *Tropic of Cancer*, Wis. 1963, 121 N.W.2d 545.

length the filth which is packed into the work and in its narration of a procession of sexual episodes. We see no need to so elaborate. The test of obscenity under the Florida statute and the effect of a trial court's finding of obscenity thereunder were stated by this court in Tralins v. Gerstein, Fla. App. 1963, 151 So.2d 19, 20, as follows:

> "• • • The test of obscenity is whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to the prurient interest, that is to say, arouses lascivious or lustful thoughts. Roth v. United States, supra; Rachleff v. Mahon, supra; see also § 847.011, supra. It is for the trier of the facts to determine the contemporary community standards by which obscenity should be measured and, applying these standards and the test set forth above, to determine whether or not a given publication is in fact obscene. Gerstein v. 'Pleasure Was My Business,' Fla. App. 1961, 136 So.2d 8; Rachleff v. Mahon, supra; State v. Clein, Fla. 1957, 93 So.2d 876. An appellate court will not substitute its judgment on these questions for that of the trier of fact absent a compelling reason to do so apparent in the record. See Rachleff v. Mahon, supra."

The record discloses the chancellor approached the decision on a basis which was consistent with the standard previously announced by the Florida courts and with the tests set forth in the Roth and Day cases.[3] For those reasons, and because the question of validity of the statute was waived and the decision found not to involve constitutional construction, we consider the jury's decision con-

---

[3] *Roth* v. *United States* (1957), 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498; *Manual Enterprises* v. *Day* (1962), 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639.

clusive on the matter.[1] The finding of obscenity has not been shown by the appellant to be contrary to the law or to the manifest weight and preponderance of the evidence.

Affirmed.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
January Term, A.D. 1963

Case No. 62-710

GROVE PRESS, INC., *Appellant*,

vs.

STATE OF FLORIDA, ex rel. RICHARD E. GERSTEIN, as State Attorney for the Eleventh Judicial Circuit of Florida in and for Dade County, Florida, and WHELAN DRUG CO., INC., a Florida corporation, *Appellees*.

Opinion filed May 1, 1963.

An Appeal from the Circuit Court for Dade County, Harold R. Vann, Judge.

Tobias Simon and Irma Robbins Feder, for appellant.

Richard W. Ervin, Attorney General, and Herbert P. Benn, Assistant Attorney General, for State; Shapiro & Fried, for Whelan Drug Co., appellees.

---

[1] Cases in other jurisdictions for the most part were concerned with the question of obscenity in the legislative and constitutional sense. See cases cited in Note 2, supra.

Before CARROLL, HORTON AND HENDRY, JJ.

PER CURIAM.

After this appeal was briefed this court set the cause for a preliminary argument on jurisdiction.

The suit was brought by the state attorney in Dade County, under chapter 847, Fla. Stat., F.S.A., the Florida obscenity statute, to enjoin sale and distribution of the book, "Tropic of Cancer," authored by Henry Miller and published by the appellant Grove Press, Inc. In a final decree which granted an injunction the chancellor passed directly on the validity of said chapter 847.[1]

Appellant assigned as error the court's ruling with reference to the statute and argued the point in the brief. Thereafter, appellant abandoned and disclaimed the point regarding the statute.[2] Later, the parties to the appeal entered into a stipulation for the same purpose.[3]

---

[1] Regarding the statute, the decree stated:

> "The Court further finds that Chapter 847 F.S. is not unconstitutional nor in violation of the Thirteenth Declaration of Rights of the Florida Constitution nor by the First Amendment to the Constitution of the United States."

[2] The disclaimer provided: "Appellant withdraws and disclaims any ground of the appeal in the above matter dealing with the unconstitutionality of F.S. 847.011, reserving other grounds of appeal raised."

[3] The stipulation contained the following:

> "1. That the appellant's issue presented to the Court relating to the constitutionality of Section 847.011, Florida Statutes, is disclaimed, not alive and is withdrawn from review.
>
> "2. That the issue will not be considered in this cause and is without merit.
>
> "3. That pursuant to and in consideration of the above, the appellee withdraws its motion to strike appellant's disclaimer."

Under Article V, § 4(2) of the Florida Constitution, appeals proceed directly to the Supreme Court in designated instances including "final judgments or decrees directly passing upon the validity of a state statute."

In the case of City of Miami v. Steckloff, Fla. 1959, 111 So.2d 446, in an appeal from such a decree, in which the appellant failed to seek review of "the aspect of the decree passing on the statute," the Supreme Court held the appeal could not be taken directly to that court, and that jurisdiction of the appeal was in the district court. And a decree which passes on validity of a statute may not be adequate to authorize direct appeal to the Supreme Court where the party's challenge of the statute in the trial court was frivolous or not genuine. City of Miami v. Steckloff, supra. The validity of the statute on which the instant case was based had been established recently by the Supreme Court. Tracey v. State, Fla. 1961, 130 So.2d 605.

Here the appellant contended that by withdrawing the point relating to validity of the statute its appeal had been brought within the authority of the Steckloff case, with the result that jurisdiction was properly in the district court. On behalf of the state it was argued that the question of the validity of the statute was inseparable, and was inherent in the appeal.

In the situation presented, it is by no means clear whether jurisdiction of the appeal is in the Supreme Court or is in this court. Therefore, we are providing for transfer of this appeal to the Supreme Court pursuant to a policy which we deem appropriate, that when an appeal lodged here is one as to which our jurisdiction is doubtful and in which there is presented a close question as to whether the jurisdiction is in the Supreme Court or in this court, an order of transfer should be made under rule 2.1 a(5)(d), F.A.R., in order that the Supreme Court as the paramount court may have early and timely opportunity to determine the question of its jurisdiction, to the end

that the appeal may be heard and decided expeditiously in the proper appellate forum.

Whereupon, this court, as authorized and empowered by rule 2.1 a(5)(d), F.A.R., directs that the notice of appeal and all other papers filed prior to May 7, 1963, shall on that date be transferred to the Supreme Court of Florida.

It is so ordered.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT
January Term, A.D. 1963
Tuesday, May 7, 1963

Case No. 62-710

GROVE PRESS, INC., *Appellant*,

vs.

STATE OF FLORIDA, ex rel. RICHARD E. GERSTEIN, as State Attorney for the Eleventh Judicial Circuit of Florida in and for Dade County, Florida, and WHELAN DRUG CO., INC., a Florida corporation, *Appellees*.

The court having heretofore given notice that this cause will be transferred to the Supreme Court of Florida as the proper court having jurisdiction of this cause, it is ordered that this cause is, this date, transferred to the Supreme Court of Florida.

A True Copy
ATTEST:

WILLIAM P. CARTER
Clerk District Court of Appeal,
Third District

By LOUIS J. SPALLONE
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA
January Term, A.D. 1963
Friday, May 31, 1963

Case No. 32,733

GROVE PRESS, INC., a New York corporation, *Appellant*,

vs.

THE STATE OF FLORIDA, ex rel. RICHARD E. GERSTEIN, as State Attorney for the Eleventh Judicial Circuit of Florida in and for Dade County, Florida, *Appellee*.

This cause coming on this day for consideration, and it appearing that the appellant did not raise, as a question on appeal, the decision of the trial court relating to the validity of the statute in question, and, therefore, the question is not presented for decision on such appeal. See City of Miami vs. Steckloff, 111 So.2d, page 446.

It is, therefore, ordered that this cause be and the same is hereby transferred back to the District Court of Appeal of Florida, Third District, for consideration and determination.

A True Copy

TEST:

GUYTE P. MCCORD
Clerk Supreme Court

APPENDIX B

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE OUNTY

No. 61C 11673

THE STATE OF FLORIDA, ex rel. RICHARD E. GERSTEIN, as State Attorney for the Eleventh Judicial Circuit of Florida in and for Dade County, Florida, *Appellee*,

vs.

WHELAN DRUG CO., INC., a Florida corporation, and GROVE PRESS, INC., a New York corporation, *Defendants*.

Final Decree

This cause arises out of the complaint of Richard E. Gerstein, as State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County, seeking an injunction against Whelan Drug Co., Inc., a Florida corporation, from the sale and distribution of the book "Tropic of Cancer" written by Henry Miller. Grove Press, Inc., a New York corporation and publisher of the aforesaid "Tropic of Cancer" written by Henry Miller, petitioned this Court to intervene as a co-defendant. This petition was granted. There are no disputed issues of fact except the defendants contend the book "Tropic of Cancer" by Henry Miller is not obscene material in violation of Florida Statutes Chapter 847. The book "Tropic of Cancer" written by Henry Miller was sold, offered for sale and disseminated by the defendant Whelan Drug Co., Inc., a Florida corporation, in Dade County, Florida, as

alleged in the Bill of Complaint. Within the jurisdiction of this Court the defendant did publish the aforesaid "Tropic of Cancer" written by Henry Miller and has voluntarily submitted itself to the jurisdiction of this Court. This Court submitted the question of whether or not the book was obscene as defined by the laws of the State of Florida to a duly constituted jury of six persons. This jury having read the book, having heard testimony offered by the complainants and the defendants, and after argument of counsel returned a special verdict of guilty. That is, that the aforesaid book "Tropic of Cancer" was obscene. Therefore, the Court finds as follows:

1. That the plaintiff, Richard E. Gerstein, is the State Attorney for the Eleventh Judicial Circuit in and for Dade County, Florida, and is authorized by the laws of Florida to institute this action.

2. That the defendant, Whelan Drug Co., Inc., a Florida corporation, did sell, offer for sale and disseminate in Dade County the book "Tropic of Cancer" written by Henry Miller, and that the defendant, Grove Press, Inc., a New York corporation, was the publisher of the aforesaid book "Tropic of Cancer" by Henry Miller, and has voluntarily submitted itself to the jurisdiction of this Court.

3. That the said book "Tropic of Cancer" by Henry Miller was obscene in that to the average person applying the contemporary Dade County community standards and taking the dominant theme of the whole book "Tropic of Cancer" by Henry Miller would appeal to the prurient interest of such average reader in Dade County, Florida.

4. That this finding that the said book "Tropic of Cancer" by Henry Miller, which was introduced in evidence without objection, was obscene as determined by a jury of six Dade County residents by a special verdict.

5. The Court further finds that Chapter 847 F.S. is not unconstitutional nor in violation of the Thirteenth Dec-

laration of Rights of the Florida Constitution nor by the First Amendment to the Constitution of the United States.

Wherefore, It Is Ordered and Decreed:

1. That the defendants, Whelan Drug Co., Inc., a Florida corporation, and Grove Press, Inc., a New York corporation, separately and severally be and they are each hereby permanently prohibited and enjoined from printing, publishing, disseminating, selling, lending, giving away, distributing, transmuting, showing, transmitting or offering to sell, lend, give away, distribute, transmit, show or transmute the book "Tropic of Cancer" by Henry Miller or any facsimile or copy of the book "Tropic of Cancer" by Henry Miller within the jurisdiction of this Court.

2. That the defendants, Whelan Drug Co., Inc., a Florida corporation, and Grove Press, Inc., a New York corporation, separately be and they are each thereby permanently prohibited and enjoined from bringing, importing or transporting in or into Dade County, Florida, or exporting from Dade County, Florida, by mail, express company nor private carrier or any means whatsoever, the aforesaid book "Tropic of Cancer" by Henry Miller, or any facsimile or copy thereof.

3. That the Court retains jurisdiction of this cause and the parties in such matters hereof for such other and further proceedings as may be required by law or equity.

Done and ordered in the Courthouse at Miami, Dade County, Florida, this 16th day of October, 1962.

Harold R. Vann
Circuit Judge
Eleventh Judicial Circuit of
Florida, in and for Dade County.

APPENDIX C

FLA. STAT. 847.011 Prohibition of certain acts in connection with obscene, lewd, etc., materials, penalty (1)(a) A person who knowlingly sells, lends, gives away, distributes, transmits, shows or transmutes, or offers to sell, lend, give away, distribute, transmit, show or transmute, or has in his possession, custody, or control with intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise in any manner, any obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose; or who knowingly designs, copies, draws, photographs, poses for, writes, prints, publishes, or in any manner whatsoever manufactures or prepares any such material, matter, article, or thing of any such character; or who knowingly writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting to state, where, how, of whom, or by what means any, or what purports to be any, such material, matter, article, or thing of any such character can be purchased, obtained, or had; or who in any manner knowingly hires, employes, uses, or permits any person to do or assist in doing, either knowingly or innocently, any act or thing mentioned above, is guilty of a misdemeanor and shall be punished by imprisonment in the county jail not exceeding one year or by fine not exceeding $1,000.00, or both. A person who, after hav-

ing been convicted of a violation of this section, thereafter violates any of its provisions, is guilty of a felony and shall be punished by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year or by fine not exceeding $10,000.00, or by both such fine and imprisonment.

(b) The knowing possession by any person of six or more identical or similar materials, matters, articles, or things coming within the provisions of the foregoing paragraph (a) is presumptive evidence of the violation of said paragraph.

(2) A person who knowingly has in his possession, custody or control any obscene lewd lascivious filthy indecent immoral sadistic or masochistic book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose, without intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise the same, is guilty of a misdemeanor and shall be punished by imprisonment in the county jail not exceeding six months or by fine not exceeding $500.00, or both. In any prosecution for such possession, it shall not be necessary to allege or prove the absence of such intent.

(3) No person shall as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, or publication require that the purchaser or consignee receive for resale any other article,

paper, magazine, book, periodical, or publication reasonably believed by the purchaser or consignee to be obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic, and no person shall deny or threaten to deny or revoke any franchise or impose or threaten to impose any penalty, financial or otherwise, by reason of the failure of any person to accept any such article, paper, magazine, book, periodical, or publication, or by reason of the return thereof. Whoever violates this section is guilty of a felony and shall be punished by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year or by fine not exceeding $10,000.00, or by both such fine and imprisonment.

(4) Every act, thing, or transaction forbidden by this section shall constitute a separate offense and shall be punishable as such.

(5) Proof that a defendant knowingly committed any act or engaged in any conduct referred to in this section may be made by showing that at the time such act was committed or conduct engaged in he had actual knowledge of the contents or character of the material, matter, article, or thing possessed or otherwise dealt with, or by showing facts and circumstances from which it may fairly be inferred that he had such knowledge, or by showing that he had knowledge of such facts and circumstances as would put a man of ordinary intelligence and caution on inquiry as to such contents or character.

(6) There shall be no right of property in any of the materials, matters, articles, or things possessed or otherwise dealt with in violation of this section, and upon the seizure of any such material, matter, article, or thing by any authorized law enforcement officer the same shall be delivered to and held by the clerk of the court having jurisdiction to try such violation. When the same is no longer required as evidence, the prosecuting officer or any claim-

ant may move the court in writing for the disposition of the same and after notice and hearing, the court, if it finds the same to have been possessed or otherwise dealt with in violation of this section, shall order the sheriff to destroy the same in the presence of the clerk; otherwise, the court shall order the same returned to the claimant if he shows that he is entitled to possession. If destruction is ordered, the sheriff and clerk shall file a certificate of compliance.

(7) (a) The circuit court has jurisdiction to enjoin a threatened violation of this section upon complaint filed by the state attorney, county solicitor, or county prosecuting attorney in the name of the state upon the relation of such state attorney, county solicitor, or county prosecuting attorney.

(b) After the filing of such a complaint, the judge to whom it is presented may grant an order restraining the person complained of until final hearing or further order of the court. Whenever the relator state attorney, county solicitor or county prosecuting attorney shall request a judge of said court to set a hearing upon an application for such a restraining order, such judge shall set such hearing for a time within three days after the making of such request. No such order shall be made unless such judge shall be satisfied that sufficient notice of the application therefore has been given to the party restrained of the time when and place where the application for such restraining order is to be made, provided, however, that such notice shall be dispensed with when it is manifest to such judge, from the sworn allegations of the complaint or the affidavit of the plaintiff or other competent person, that the apprehended violation will be committed if an immediate remedy is not afforded.

(c) The person sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue

and a decision shall be rendered by the court within two days of the conclusion of the trial.

(d) In the event that a final decree of injunction is entered, it shall contain a provision directing the defendant having the possession, custody, or control of the materials, matters, articles, or things affected by the injunction to surrender the same to the sheriff and requiring the sheriff to seize and destroy the same. The sheriff shall file a certificate of his compliance.

(e) In any action brought as provided in this section, no bond or undertaking shall be required of the state or the state attorney or county solicitor or county prosecuting attorney before the issuance of a restraining order provided for by paragraph (b) of this subsection, and there shall be no liability on the part of the state or the state attorney or the county solicitor or the county prosecuting attorney for costs or for damages sustained by reason of such restraining order in any case where a final decree is readered in favor of the person sought to be enjoined.

(f) Every person who has possession, custody, or control of, or otherwise deals with any of the materials, matters, articles, or things described in this section, after the service upon him of a summons and complaint in an action for injunction brought under this section, is chargeable with knowledge of the contents and character thereof.

(8) The several sheriffs, constables, state attorneys, county solicitors, and county prosecuting attorneys shall vigorously enforce this section within their respective jurisdictions.

(9) This section shall not apply to the exhibition of motion picture films permitted by § 521.02.

(10) For the purposes of this section, the test of whether or not material is obscene is: Whether to the average person, applying contemporary community stand-

ards, the dominant theme of the material taken as a whole appeals to prurient interest.

(11) For the purposes of this section, the word person includes individuals, firms, associations, corporations, and all other groups and combinations. Laws 1961, c. 61-7, §§ 1-11.

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IN THE

Supreme Court of the United States

October Term, 1963

No. 718

GROVE PRESS, INC., a New York corporation,
Petitioner,

vs.

RICHARD E. GERSTEIN, as State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County, and WHELAN DRUG CO., INC., a Florida corporation,
Respondents

Respondent's Brief and Appendix in Opposition to Petition for Writ of Certiorari to the District Court of Appeal Third District, State of Florida

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INDEX

	Page
Opinion Below	2
Jurisdiction	2
Statute Involved	4
Questions Presented for Review	4
Statement of the Case	5
Argument	
1. The Test For Obscenity	6
2. The Application of Local, Rather Than National, Standards of Decency	10
3. The Conclusiveness of the Jury Verdict	13
4. "Tropic of Cancer" is an Obscene Book	16
Conclusion	23
Certificate of Service	25

APPENDIX

Final Decree of Trial Court	A. 1
Opinion of the District Court of Appeal, Third District, State of Florida	A. 4
Pertinent Parts of Section 847.011, F.S. 1961, relating to Obscene Publications	A. 8

TABLE OF CASES CITED

	Page
Attorney General v. Book Named "Tropic of Cancer", 184 N.E. 2d 328	19
Boyd v. County of Dade, (Fla.1960), 123 So.2d 323	4
Grove Press, Inc. v. State of Florida, ex rel Richard E. Gerstein, 156 So.2d 537	A. 4
Kahm v. United States (1962), 300 F.2d 78	13, 14
Kingsley Books v. Brown, 354 U.S. 436	11
Kingsley Int. Pic. Corp. v. Regents of NYU, 360 U.S. 684	15
Manual Enterprises v. Day (1962), 370 U.S. 478	8, 11
People v. Fritch, 192 N.E. 2d 713	20, 22, 23
People v. Smith, 327 P.2d 639	15
Robinson v. States (Fla.1961), 132 So.2d 3	4
Roth v. United States (1957), 354 U.S. 476	7, 10, 12, 17, 18
State v. Barone (Fla.1960), 124 So.2d 490	4
State v. Chabot (1961), 106 N.W.2d 286	7
U. S. v. Two Obscene Books, 99 F.Supp. 760	18

CONSTITUTIONAL AMENDMENTS

	Page
Florida Constitution	
Article V, Section 4(2)	3
Article V, Section 5(3)	3

STATUTES

Title 28, United States Code, Section 1257	2, 3, 4
847.011, Florida Statutes 1961	2, 4

IN THE

Supreme Court of the United States

October Term, 1963

No. 718

GROVE PRESS, INC., a New York corporation,

Petitioner,

vs.

RICHARD E. GERSTEIN, as State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County, and WHELAN DRUG CO., INC., a Florida corporation,

Respondents

Respondent's Brief and Appendix in Opposition to Petition for Writ of Certiorari to the District Court of Appeal Third District, State of Florida

The Respondent, Richard E. Gerstein, as State Attorney of the Eleventh Judicial Circuit in and for Dade County, Florida, pursuant to Rule 24, Revised Rules of The Supreme Court of the United States, files this his brief opposing the petition for a writ of certiorari, filed December 31, 1963, in the above-styled cause. The Respondent was the Plaintiff and the Petitioner was one of the Defendants in the Trial Court.

The letter (A.) refers to the appendix. A copy of the transcript of record was not served upon the Respondent and therefore is not available for reference in this brief. All emphasis supplied.

For explanation and the convenience of this Court, the Respondent has appended hereto the final decree of the Florida trial court, (A. 1); the opinion of the District Court of Appeal, Third District, State of Florida, (A. 4), and portions of Florida Statutes 847.011, prohibiting obscene material, (A. 8).

OPINION OF THE FLORIDA COURT

This petition seeks to review the opinion of the District Court of Appeal, Third District, State of Florida, dated the 17th day of September, 1963, reported at 156 So.2d 537, attached hereto (A. 4), affirming the final decree of the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County, wherein the trial court adjudged the book "Tropic of Cancer" to be an obscene publication, condemned by Section 847.011, Florida Statutes, (A. 8).

JURISDICTION

The Petitioner invokes the jurisdiction of the United States Supreme Court under Title 28, United States Code, Section 1257(3). The Respondent says that Title 28, United States Code, Section 1257, when read in pari materia with the appropriate sections of the Florida Constitution, indicates that the Petitioner has misconceived his procedure and improvidently seeks the jurisdiction of this Court.

Title 28, United States Code, Section 1257, states:

> "§ 1257. State Courts; appeal; certiorari
> Final judgments or decrees rendered by the **highest court of a state** in which a decision could be had, may be reviewed by the Supreme Court as follows: (1), (2), (3)." (emphasis supplied)

The Petitioner's contentions that the questionable book is protected by the First Amendment and the Fourteenth Amendment to the United States Constitution and that the Florida obscenity statute was unconstitutionally applied to the book in question have not been presented to, nor passed upon by The District Court of Appeal of Florida, Third District and The Supreme Court of Florida.

Only the Supreme Court of Florida has jurisdiction to hear appeals from trial courts directly "passing upon the validity of a state statute, or a federal statute, or treaty, or construing the controlling provision of the Florida or Federal Constitution". Such appeals when **properly presented** are expressly authorized by Article V, Section 4(2), Florida Constitution (Fla.App. Rules 2.1(5)(a)).

The District Court of Appeal, Third District, State of Florida, is expressly forbidden to entertain appeals from the trial courts which appeals may be taken direct to The Supreme Court (Article V, Section 5(3), Constitution of Florida).

It is important to note that the Petitioner, in The District Court of Appeal of Florida, Third District, expressly disclaimed and waived the constitutional ques-

tions it is attempting to raise for the first time in this Court. By so doing, the Petitioner prevented itself from properly presenting these constitutional questions in the Florida Appellate Courts.

Therefore, the Petitioner should not be permitted to invoke the jurisdiction of The Supreme Court of the United States unless and until he has exhausted the established judicial procedure provided for and sanctioned by the Constitution of the State of Florida, the Florida Appellate Rules, the decisions of The Supreme Court of Florida, and by Title 28, United States Code, Section 1257. (For constitutional direct appeals to The Supreme Court of Florida see State v. Barone, 124 So.2d 490, (Fla.1960); Boyd v. County of Dade, 123 So.2d 323, (Fla.1960); Robinson v. State of Florida, 132 So.2d 3, (Fla.1961).

THE FLORIDA STATUTE INVOLVED

Section 847.011, Florida Statutes 1961, condemns the publication, distribution and sale of obscene material, provides a remedy and makes it the duty of the State Attorney to enforce this statute (A. 8).

QUESTIONS PRESENTED FOR REVIEW

1. **Whether the trial court correctly instructed the jury with regard to the legal tests or standards in determining whether the book "Tropic of Cancer" is obscene.**

2. **Whether the Constitutional guarantees of free expression are violated by the application of local (Dade County), rather than national,**

"contemporary community standards" to the question of whether "Tropic of Cancer" is obscene.

3. Whether the petitioner was denied Constitutional guarantees of "freedom of expression" and "due process" by having a jury determine conclusively and as a question of fact that the book "Tropic of Cancer" is obscene.

4. Whether the book "Tropic of Cancer" is an obscene book condemned by Section 847.011, Florida Statutes 1961, and therefore not protected by the First and Fourteenth Amendments of the Constitution of the United States.

STATEMENT OF THE CASE

The Respondent, Richard E. Gerstein, as State Attorney for the Eleventh Judicial Circuit of Florida, filed a complaint in the Circuit Court of the Eleventh Judicial Circuit of Florida, seeking an injunction against Whelan Drug Co., Inc., a Florida corporation, from the sale and distribution of the book "Tropic of Cancer" written by Henry Miller. The petitioner, Grove Press, Inc., a New York corporation and publisher of the "Tropic of Cancer", petitioned the trial court to intervene as a co-defendant, and this petition was granted. The only issue raised by the pleadings in the trial court was whether "Tropic of Cancer" is an obscene book in violation of Florida Statutes Chapter 847. The trial court submitted the question of whether the book is obscene as defined by the laws of the State of Florida to a duly constituted jury of six persons. This jury, after reading the book

and after hearing testimony offered by the Petitioner and the Respondent relating to "contemporary community standards" and to the alleged literary and social merit of the book in question, returned a special verdict of guilty. The trial court thereupon entered a final decree upholding the constitutionality of the statute in question and adjudging "Tropic of Cancer" to be obscene.

An appeal was taken by the Petitioner to the District Court of Appeal of Florida, Third District. In its assignments of error, the Petitioner questioned the constitutionality of the Florida statute governing obscenity, but the Petitioner subsequently abandoned this attack upon the statute. The appellate court considered the appeal on the merits and affirmed the final decree of the trial court.

ARGUMENT

1. THE TEST FOR OBSCENITY

The transcript of record in this cause will show that the trial court's charge to the jury included the following instruction:

> "In determining whether or not this book, Tropic of Cancer, is obscene, you must apply the test laid down by our appellate courts and the Florida Legislature, which reads as follows: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

Based on this instruction, it is submitted that the jury rendered its verdict and the trial court rendered its decision pursuant to said verdict clearly and specifically within the framework of the legal requirements set forth in the case of **Roth v. U.S.**, (1957), 354 U.S. 476. And therefore, since the proper test of obscenity was applied in the trial court, the final decree in question should not be disturbed. This argument is supported by a decision of the Supreme Court of Wisconsin in the case of **State v. Chabot**, (1961), 106 N.W. 2d 286, wherein the Court reasoned as follows:

> "In this case the trial court adopted and applied to the exhibits the standard set forth in the Roth case as the test of obscenity. The court was the finder of the fact, appellant having waived trial by jury. Thus, it was the 'exclusive judge of what the common conscience of the community is . . . as a whole.'
>
> • • • • •
>
> "The trial court stated in its decision:
>
> 'The dominant theme of each item of material noted, taken as a whole, to the average person, applying contemporary community standards, appeals to prurient interest within the meaning of the rule of the Roth case and is obscene. . . .'
>
> "Appellant calls attention to several cases involving obscenity convictions since the Roth case, where certiorari was granted by the United States Supreme Court and the judgments re-

versed without opinion, citing the Roth Case. Sunshine Book Co. v. Summerfield, (1958), 355 U.S. 732, 78 S.Ct. 365, 2 L.ED. 2d 352; One, Inc. v. Olesen, (1958), 355 U.S. 371, 78 S.Ct. 365, 2 L.Ed 2d 352. . . It is argued that the effect of these decisions is to change the standard enunciated in the Roth case. Analysis of the cases discloses that the tests of obscenity there applied were not the test set forth and approved in the Roth case. It is apparent that the United States Supreme Court, in citing the Roth case in each such reversal, has insisted that the test to be applied is that approved in the Roth case."

It is the Petitioner's contention that the test for obscenity applied by the jury and the trial judge was incomplete in that they failed to consider whether or not the book "Tropic of Cancer" is "patently offensive". This contention is based on an opinion of this court in the recent case of **Manuel Enterprises, Inc. v. Day**, (1962), 370 U.S. 478. There is no question that this Court ruled in that case that obscerity under the federal st ute requires proof of two elements: (1) patent offensiveness; and (2) "prurient interest" appeal. However, it is submitted that this Court a o ruled that the two elements are so closely inter-related that it is unnecessary to prove the patent offensiveness unless the publication in question is limited in its appeal to a particular class—such as homosexuals. This contention is based on the following reasoning of the Supreme Court at page 486 of 370 U.S.:

"Obscenity under the federal statute thus requires proof of two distinct elements: (1) patent

> offensiveness; and (2) "prurient interest" appeal. Both must conjoin before challenged material can be found "obscene" under §1461. In most obscenity cases, to be sure, the two elements tend to coalesce, for that which is patently offensive will also usually carry the requisite "prurient interest" appeal. It is only in the unusual instance where, as here, the prurient interest" appeal of the material is found limited to a particular class of persons that occasion arises for a truly independent inquiry into the question whether or not the material is patently offensive."

Since the appeal of subject book "Tropic of Cancer" is not limited to a particular class, it is submitted that there was no need for the jury to determine its patent offensiveness.

In any event, it is apparent from the record in this case that the trial court, in addition to charging the jury on the "prurient interest" test, also instructed the jury to determine the question of whether or not "Tropic of Cancer" is patently offensive, for the record will reflect that the trial court instructed the jury as follows:

> "The test in each case is the effect of the book, considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. This book must be judged as a whole, in its entire context, and you are not to consider detached or separate portions in reaching a conclusion. You

> judge the book which has been put in evidence by present-day standards of the community. **You may ask yourselves does it offend the common conscience of the community by present-day standards."**

In giving this instruction, it is submitted that the Court was telling the jury that in deciding the "prurient interest" question, the jury must also determine whether the book "Tropic of Cancer" was offensive to the moral standards of this community, or in other words, whether the said book was patently offensive. It is apparent, therefore, that the tests applied by the jury were in conformity with the tests for obscenity promulgated by this Court.

2. THE APPLICATION OF LOCAL, RATHER THAN NATIONAL, STANDARDS OF DECENCY

The Petitioner contends that the standards to be applied by the trier of fact in determining whether a book is obscene must be national rather than local, standards. This argument might have some merit if this Court in the **Roth** case had limited the "prurient interest" test to "contemporary standards" rather than "contemporary community standards". It is submitted that the inclusion of the word "community" indicated that this Court was of the opinion that the standards to be considered are those of the locality in which the particular book is being distributed. This is particularly true if we accept the proposition that whether a given book is obscene is best determined by a jury. As Mr. Justice Brennan pointed

out in his dissenting opinion in **Kingsley Books v. Brown**, 354 U.S. 436, at 448:

> "The Jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards."

It is obvious that the average juror in Dade County, Florida could not possibly apply national, contemporary standards of morality for the simple reason that the said average juror is almost completely unaware of moral standards outside of his own community. Indeed, there is such a plethora of ideas and philosophies which compose present-day societies, that to extract a particular community standard from this mass is an extremely difficult task for any jury to perform, even when limited to a particular locality. If the task is enlarged to include the moral standards of the entire nation, then the jury's task becomes insurmountable, and the Roth test is rendered inoperative.

It is submitted that the only occasion for considering national moral standards is when the federal statutes governing obscenity are involved. In **Manual Enterprises v. Day**, 370 U.S. 478, at 488, Mr. Justice Harlan, speaking for this Court, said:

> "There must first be decided the relevant 'com-

> munity' in terms of whose standard of decency the issue must be joined. We think that the proper test under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency."

Perhaps the most cogent argument in favor of applying local standards in the enforcement of State obscenity statutes may be seen in the dissenting opinion of Mr. Justice Harlan in the **Roth** case (354 U.S. at p. 505), which reads in part as follows:

> " * * * It has often been said that one of the great strengths of our federal system is that we have, in the forty-eight States, forty-eight experimental social laboratories. State statutory law reflects predominantly this capacity of a legislature to introduce novel techniques of social control. The federal system has the immense advantage of providing forty-eight separate centers for such experimentation.' Different States will have different attitudes toward the same work of literature. The same book which is freely read in one State might be classed as obscene in another. And it seems to me that no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States, so long as there is no uniform nation-wide suppression of the book, and so long as other States are free to experiment with the same or bolder books.

"Quite a different situation is presented, however, where the Federal Government imposes the bar. The danger is perhaps not great if the people of one State, through their legislature, decide that "Lady Chatterley's Lover" goes so far beyond the acceptable standards of candor that it will be deemed offensive and non-sellable, for the State next door is still free to make its own choice. At least we do not have one uniform standard. But the dangers to free thought and expression are truly great if the Federal Government imposes a blanket ban over the Nation on such a book. The **prerogative of the States to differ on their ideas of morality will be destroyed, the ability of States to experiment will be stunted.** The fact that the people of one State cannot read some of the works of D. H. Lawrence seems to me, if not wise or desirable, at least acceptable."

3. THE CONCLUSIVENESS OF THE JURY VERDICT

The Petitioner contends that it was denied "due process of law" by having a jury determine conclusively that the book "Tropic of Cancer" is obscene. It is apparently the Petitioner's position that the book is entitled to a trial de novo in the appellate courts of Florida as well as in this Court. This argument overlooks the fact that this Court, in the Roth case, rather summarily approved the findings of the courts below on the issue of obscenity, and therefore, it is submitted that the majority opinion in the Roth case supports the principle that the question of obscenity is one of fact for the jury. In **Kahm** v.

United States, 300 F.2d 78 (1962), Circuit Judge Pope reasoned as follows:

> "Appellant says that the question of obscenity is one of law, and not of fact, and hence not a matter properly to be submitted for jury determination; —that what is here involved is his claim of constitutional right, as a part of his First Amendment freedoms to distribute this literature. He says this can only be adjudged as a matter of law. In view of the Roth case and its express statement that the trial court in that case 'followed the proper standard' and 'used the appropriate definition of obscenity' in its instructions to the jury, we think it is idle to contend that the question of obscenity was not properly submitted to the jury in this case."

We agree, of course, that where there is a claim that constitutional rights were denied in the trial court, then it is incumbent upon the appellate court to examine the evidential basis on which the factual conclusions of the jury or trial court were founded. It is submitted that this examination was performed by The District Court of Appeal of Florida, Third District, for in its opinion (A. 7), we find the following statement:

> "The finding of obscenity has not been shown by the appellant to be contrary to the law or to the manifest weight or preponderance of the evidence."

Whatever the courts may say about obscenity being a fact question for the jury, they are acutely conscious of

the issue's constitutional overtones, and, for this reason, not infrequently feel constrained to add their finding to that of the jury. Indeed, the trial court in the case at bar made such a finding in its final decree (A. 2). Such an explanation seems to fit the case of **People v. Smith**, 327 p. 2d 639, in which the court said:

> "Under any test, the book concerned in this prosecution was properly held to be obscene by the trial court, and we share such a conclusion upon our independent view of the evidence, if that be necessary in view of the assertion of constitutional right, though such a right is clearly nonexistent. (Citing Roth). Obscenity is not constitutionally protected. The 'community standard' is, as in other criminal matters, to be determined by the trier of fact."

If the Petitioner is correct in its contention that every questionable book is entitled to a trial de novo in the appellate courts, then this Court must become a National Board of Censors. This possibility was strongly objected to by Mr. Justice Black in his concurring opinion in **Kingsley Int. Pic. Corp v. Regents of N.Y.U.**, 360 U.S. 684, at 689, which reads in part as follows:

> "If despite the constitution, however, this Nation is to embark on the dangerous road of censorship, my belief is that this Court is about the most inappropriate Supreme Board of Censors that could be found. So far as I know, judges possess no special expertise providing exceptional competency to set standards and to supervise the private morals of the Nation. In addition, the

Justices of this Court seem especially unsuited to make the kind of value judgments—as to what movies are good or bad for local communities—which the concurring opinions appear to require. We are told that the only way we can decide whether a State or municipality can constitutionally bar movies is for this Court to view and appraise each movie on a case-by-case basis. Under these circumstances, every member of the Court must exercise his own judgment as to how bad a picture is, a judgment which is ultimately based at least in large part on his own standard of what is immoral. The end result of such decisions seems to me to be a purely personal determination by individual Justices as to whether a particular picture viewed is too bad to allow it to be seen by the public. Such an individualized determination cannot be guided by reasonably fixed and certain standards. Accordingly, neither States nor moving picture makers can possibly know in advance, with any fair degree of certainty, what can or cannot be done in the field of movie making and exhibiting. This uncertainty cannot easily be reconciled with the rule of law which our Constitution envisages."

4. "Tropic Of Cancer" Is An Obscene Book

It is apparently the Petitioner's position that even though a questioned book may be obscene, if it has the slightest redeeming social or literary importance, it is then entitled to the full protection of the constitutional guaranties. It is submitted that this contention is not

supported by the law, as evidenced by the following pronouncements in the **Roth** case, 354 U.S., at 486:

> "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, **unless excludable because they encroach upon the limited area of more important interests.** But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. This is the same judgment expressed by this Court in Chaplinsky v. New Hampshire, 315 U. S. 568, 571-572, 62 S. Ct. 766, 769, 86 L.Ed. 1031:
>
> > " * * * There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. **These include the lewd and obscene * * . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality * * *.**

> We hold that obscenity is not within the area of constitutionally protected speech or press." (Emphasis supplied.)

Based on the **Roth** case, it is submitted that if the dominant theme of a book falls within the test for obscenity, then the book is not entitled to the protection afforded free speech, even though it may have some slight redeeming social or literary importance.

It is the Respondent's position that even though "Tropic of Cancer" may have some slight redeeming social or literary importance, it is still hard-core pornography and is obscene no matter what test for obscenity is applied to it. This position is supported by several decisions in which the Courts have been called upon to determine whether the book in question is obscene. For example, in the case of **U. S. v. Two Obscene Books**, 99 F.Supp. 760, District Judge Goodman made the following analysis of "Tropic of Cancer":

> "The Claimant here, as well as some of the critics and reviewers who speak in his behalf, have presented a species of "confession and avoidance" defense of Henry Miller. The many long filthy descriptions of sexual experiences, practices and organs are of themselves admitted to be lewd. They are sought to be justified by the claim that the books as a whole have an artistic pattern, into which the obscene and scatological portions fit as part of a whole literary mosaic. But I must conclude that this is mere sophistry. The filthy scatological portions are written in a bluntly different and distinct style from the pre-

tentious metaphysical reflective manner of writing otherwise. Thus the conclusion is justified that either the alleged literary ability of the author deserted him or that he had his eye on "the box office."

"It may be that the modern trend towards frankness in sexual matters has influenced the viewpoint of claimant and the critics who espouse the cause of Miller. Certainly, the theatre, the moving pictures, other similar media and Mr. Kinsey may have affected our attitude as to such matters. It is sufficient to say, however, that the many obscene passages in the books have such an evil stench that to include them here in footnotes would make this opinion pornographic. For example, there are several passages where the female sexual organ and its functions are described and referred to in such detailed vulgar language as to create nausea in the reader. If this be importable literature, then the dignity of the human person and the stability of the family unit, which are the cornerstones of our system of society, are lost to us."

In a dissenting opinion by Chief Justice Wilkens and Justices Williams and Kirk of the Supreme Judicial Court of Massachusetts, in the case of **Attorney General v. Book Named "Tropic of Cancer"**, 184 N.E. 2d 328, we find the following description:

"The book is pitched at the nadir of scatology. Indeed, its low level is relied upon as engulfing all obscene effect. We cannot bring ourselves

to accept the thesis that the book, thus indicted, becomes endowed with constitutional protection. Its detailed and sordid sex episodes, persistently inserted at intervals in what passes for narrative, leave an outweighing staccato impression. In our opinion it should be classified as pornography."

And finally, in what must be termed the leading case in support of the contention that "Tropic of Cancer" is hard-core pornography, we refer this Court to the case of **People v. Fritch,** 192 N.E.2d 713. At pages 716 and 717 in the opinion written by Judge Scileppi for the Court of Appeals of New York, is the following legal analysis of the book in question:

"In the exercise of our duty to make an independent constitutional appraisal, we have read the book carefully and conclude that it is nothing more than a compilation of a series of sordid narrations dealing with sex in a manner designed to appeal to the prurient interest. It is devoid of theme or ideas. Throughout its pages can be found a constant repetition of patently offensive words used solely to convey debasing portrayals of natural and unnatural sexual experiences. It is a blow to sense, not merely sensibility. It is, in short, "hard-core pornography", dirt for dirt's sake (United States v. One Book Called "Ulysses", D.C., 5 F. Supp. 182), and dirt for money's sake (Kinsley Intern. Pictures Corp. v. Regents of University of State of New York, 360 U.S. 684, 692, 79 S.Ct. 1362, 3 L.Ed.2d 1512). We see no reason for adopting an unrealistic

appraisal of the nature of this book when there is such overwhelming proof of its incompatability with the current moral standards of our community. If, as the County Court held, this book is not obscene as a matter of law, it is difficult to conceive when, if ever, a book can be held to be obscene under any established legal standard.

"Defendants contend that even if "Tropic of Cancer" is obscene when judged by the established tests, it is nevertheless, under the Roth case, supra, entitled to protection because it has "substantial literary merit". We do not interpret Roth, or any other authority, as establishing any such rule of law. Defendants place reliance upon the court's statement in Roth that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance" (354 U.S. supra, p. 484, 77 S.Ct. p. 1309, 1 L.Ed.2d 1498). But it does not follow that the converse is true; indeed, if such were the case the holding in Roth would be vitally eroded, for the test as pronounced there is the appeal to the prurient interest of the average person in the contemporary community. It does not follow, then, that because an alleged work of literature does not appeal to the prurient interest of a small group of intellectuals that it is not obscene under the prurient interest, or for that matter any other legal test of obscenity. This would permit the substitution of the opinions of authors and critics for those of the average person in the contemporary community.

> The fact that a few literary figures have commented favorably on this book and have lent it their prestige does not expunge from its pages the flagrantly obscene and patently offensive matter which dominates the book as a whole.'

In a concurring opinion in the **Fritch** case (492 N.E. 2d at 719), Chief Judge De[illegible]nd wrote the following diatribe against "Tropic of Cancer":

> "If this book had not been written by a recognized author, if it did not contain some "good writing" and if it were not approved by well-known reviewers, no one, I venture, would deny that it is obscene by any conceivable definition, narrow or tolerate. Its own cover blurb boasts of its "unbridled obscenity". From first to last page it is a filthy, cynical, disgusting narrative of sordid amours. Not only is there in it no word or suggestion of the romantic, sentimental, poetic or spiritual aspects of the sex relation, but it is not even bawdy sex or comic sex or sex described with vulgar good humor. No glory, no beauty, no stars—just mud. The whole book is "sick sexuality", a deliberate, studied exercise in the depiction of sex relations as debasing, filthy and revolting. On page 483 of 370 U.S., on page 1434 of 82 S.Ct., 8 L.Ed. 2d 639, Justice Harlan's opinion in Manual Enterprises, Inc. v. Day quotes the New International Dictionary's long series of definitions of "obscene". It is a remarkable fact that "Tropic of Cancer" fits every single one of those numerous meanings."

CONCLUSION

In his concurring opinion in **People v. Fritch**, 192 N.E.2d 713, at 719, Chief Judge Desmond, after finding "Tropic of Cancer" to be hard-core pornography, made the following statement, which is particularly appropriate in the case at bar:

> " . . . 'community standards' are the subjective reactions of the citizenry of a place or region. If we are to use community standards as a test, the only feasible testing method is by submission to a jury as was recognized by our own court long ago in People v. Pesky, 254 NY 373, 173 NE 227. Of course a jury cannot repeal the First Amendment but when a jury (as here) makes a finding of obscenity as to material not unreasonably deserving that epithet, there can be no violation of the Constitution. Where the book taken as a whole can under permissible constitutional standards be reasonably considered by men of ordinary prudence to be beyond the pale of contemporary notions of rudimentary decency (paraphrased from Manual Enterprises, 370 U.S., supra, p. 489, 82 S.Ct. p. 1438, 8 L.Ed. 639) then a jury verdict of 'guilty' violates no right."

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted.

By Glenn C. Mincer

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CERTIFICATE OF SERVICE

I, GLENN C. MINCER, Assistant State Attorney, Counsel for Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on March 13, 1964, I served copies of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari to the District Court of Appeal, Third District, State of Florida, on the Petitioner by mailing a copy thereof in a duly addressed envelope with postage prepaid to each of the following, to-wit, EDWARD DE GRAZIA, 1001 Connecticut Ave., N. W., Washington 36, D.C.; RICHARD YALE FEDER, 100 Biscayne Boulevard South, Miami 32, Florida; TOBIAS SIMON, c/o Fla. Civil Liberties Union, 223 S.E. 1st Street, Miami 32, Florida, and IRMA ROBBINS FEDER, 17491 N.E. 5th Avenue, North Miami Beach, Florida.

Glenn C. Mincer

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APPENDIX

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY — IN CHANCERY NO. 61C 11673

THE STATE OF FLORIDA, EX REL
RICHARD E. GERSTEIN,
As State Attorney for the Eleventh Judicial Circuit of Florida in and for Dade County, Florida,

Plaintiff,

vs.

WHELAN DRUG CO., INC.,
a Florida corporation and
GROVE PRESS, INC.,
a New York corporation,

Defendants.

FINAL DECREE

(Filed October 16, 1962)

This cause arises out of the complaint of Richard E. Gerstein, as State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County, seeking an injunction against Whelan Drug Co., Inc., a Florida corporation, from the sale and distribution of the book "Tropic of Cancer" written by Henry Miller. Grove Press, Inc., a New York corporation and publisher of the aforesaid "Tropic of Cancer" written by Henry Miller, petitioned this Court to intervene as a co-defendant. This petition was granted. There are no disputed issues of fact except the defendants contend the book "Tropic of Cancer" by Henry Miller is not obscene material in violation of Florida Statutes Chapter 847. The book "Tropic

of Cancer" written by Henry Miller was sold, offered for sale and disseminated by the defendant Whelan Drug Co., Inc., a Florida corporation, in Dade County, Florida, as alleged in the Bill of Complaint. Within the jurisdiction of this Court the defendant did publish the aforesaid "Tropic of Cancer" written by Henry Miller and has voluntarily submitted itself to the jurisdiction of this Court. This Court submitted the question of whether or not the book was obscene as defined by the laws of the State of Florida to a duly constituted jury of six persons. This jury having read the book, having heard testimony offered by the complainants and the defendants, and after argument of counsel returned a special verdict of guilty. That is, that the aforesaid book "Tropic of Cancer" was obscene. Therefore the Court finds as follows:

1. That the plaintiff, Richard E. Gerstein, is the State Attorney for the Eleventh Judicial Circuit in and for Dade County, Florida, and is authorized by the laws of Florida, to institute this action.

2. That the defendant, Whelan Drug Co., Inc., a Florida corporation, did sell, offer for sale and disseminate in Dade County the book "Tropic of Cancer" written by Henry Miller, and that the defendant, Grove Press, Inc., a New York corporation, was the publisher of the aforesaid book "Tropic of Cancer" by Henry Miller, and has voluntarily submitted itself to the jurisdiction of this Court.

3. That the said book "Tropic of Cancer" by Henry Miller was obscene in that to the average person applying the contemporary Dade County Community standards and taking the dominant theme of the whole book "Tropic

of Cancer" by Henry Miller would appeal to the prurient interest of such average reader in Dade County, Florida.

4. That this finding that the said book "Tropic of Cancer" by Henry Miller, which was introduced in evidence without objection, was obscene as determined by a jury of six Dade County residents by a special verdict.

5. The Court further finds that Chapter 847 F.S. is not unconstitutional nor in violation of the Thirteenth Declaration of Right of the Florida Constitution nor by the First Amendment to the Constitution of the United States.

WHEREFORE, IT IS ORDERED AND DECREED:

1. That the defendants, Whelan Drug Co., Inc., a Florida corporation, and Grove Press Inc., a New York corporation, separately and severally be and they are each hereby permanently prohibited and enjoined from printing, publishing, disseminating, selling, lending, giving away, distributing, transmuting, showing, transmitting or offering to sell, lend give away, distribute, transmit, show or transmute the book "Tropic of Cancer" by Henry Miller or any facsimile or copy of the book "Tropic of Cancer" by Henry Miller within the jurisdiction of this Court.

2. That the defendants, Whelan Drug Co., Inc., a Florida corporation, and Grove Press, Inc., a New York corporation, separately be and they are each thereby permanently prohibited and enjoined from bringing, importing or transporting in or into Dade County, Florida,

by mail, express company nor private carrier or any means whatsoever, the aforesaid book "Tropic of Cancer" by Henry Miller, or any facsimile or copy thereof.

3. That the Court retains jurisdiction of this cause and the parties in such matters hereof for such other and further proceedings as may be required by law or equity.

DONE AND ORDERED in the Courthouse at Miami, Dade County, Florida, this 16 day of October, 1962.

HAROLD R. VANN
Circuit Judge

156 So.2d 537:

GROVE PRESS, INC.,
a New York corporation,

Appellant,

vs.

THE STATE OF FLORIDA, ex rel.
RICHARD E. GERSTEIN,
as State Attorney for the
Eleventh Judicial Circuit of Florida, and
WHELAN DRUG CO., INC.,
a Florida corporation,

Appellees.

No. 62-710

District Court of Appeal of Florida
Third District

September 17, 1963

Richard E. Gerstein, State Attorney, Joseph Durant and George Orr, Assistant State Attorneys, Richard W. Ervin, Attorney General, and Herbert P. Benn, Assistant Attorney General, for STATE; Shapiro & Fried, for Whelan Drug Co., appellees.

Tobias Simon; Irma Robbins Feder; Richard Yale Feder, for appellant.

Before BARKDULL, C. J. and CARROLL and HORTON, JJ. CARROLL, Judge

Proceeding under the Florida obscenity statute, Chapter 847, Fla.Stat.,F.S.A. the state attorney sought and obtained an injunction with reference to the book "Tropic of Cancer", written by Henry Miller, restraining the defendant dealer and the intervenor, the publisher Grove Press, Inc., from selling and distributing the book here and from bringing it into this state. The publisher answered denying obscenity and contending the statute violated state and federal constitutional guarantees of due process of law and freedom of speech. The question of the obscenity of the book under the statute was submitted to a jury which found it obscene, prompting the final decree from which the intervenor-publisher appealed.

A holding that the statute was valid made the decision one appealable to the Supreme Court. In assignments of error and in its brief, in addition to contending the finding of obscenity was against the weight of the evidence, the appellant challenged the chancellor's ruling on the validity of the statute and contended the statute as applied to the publication was unconstitu-

tional. But prior to argument appellant withdrew its claim of invalidity and unconstitutionality of the statute. This court, being uncertain as to the effect of that action of the appellant upon the appellate jurisdiction of the Supreme Court, transferred the appeal to that court. The Supreme Court ruled against jurisdiction and returned the case. Thereafter, this court considered the appeal on the merits and heard argument. We now affirm the decree.

The book, "The Tropic of Cancer" has been judged as to the obscenity in a number of jurisdictions with differing results. Generally, those courts have discussed at some length the filth which is packed into the work and in its narration of a procession of sexual episodes. We see no need to so elaborate. The test of obscenity under the Florida statute and the effect of a trial court's finding of obscenity thereunder were stated by this court in Tralin v. Gerstein, Fla.App.1963, 151 So.2d 19, 20, as follows:

> "* * * The test of obscenity is whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to the prurient interest, that is to say, arouses lascivious or lustful thoughts. Roth v. United States, supra; Rachleff v. Mahon, supra; see also 847.011, supra. it is for the trier of the facts to determine the contemporary community standards by which obscenity should be measured and, applying these standards and the test set forth above, to determine whether or not a given publication is in fact obscene." Gerstein

v. 'Pleasure Was My Business,' Fla.App.1961, 136 So.2d 8; Rachleff v. Mahon, supra; State v. Clein, Fla.1957, 93 So.2d 876. An appellate court will not substitute its judgment on these questions for that of the trier of fact absent a compelling reason to do so apparent in the record. See Rachleff v. Mahon, supra."

The record discloses the chancellor approached the decision on a basis which was consistent with the standard previously announced by the Florida courts and with the tests set forth in the Roth and Day cases. For those reasons, and because the question of validity of the statutes was waived and the decision found not to involve constitutional construction, we consider the jury's decision conclusive on the matter. The finding of obscenity has not been shown by the appellant to be contrary to the law or to the manifest weight and preponderance of the evidence.

Affirmed.

PERTINENT PARTS OF § 847.011, F.S. 1961

847.011 Prohibition of certain acts in connection with obscene, lewd, etc., materials; penalty.—

(1)(a) A person who knowingly sells, lends, gives away, distributes, transmits, shows or transmutes, or offers to sell, lend, give away, distribute, transmit, show or transmute, or has in his possession, custody, or control with intent to sell, lend, give away, distribute, transmit, show transmute, or advertise in any manner, any obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose; or who knowingly designs, copies, draws, photographs, poses for, writes, prints, publishes, or in any manner whatsoever manufactures or prepares any such material, matter, article, or thing of any such character; or who knowingly writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting to state, where, how, of whom, or by what means any, or what purports to be any, such material, matter, article, or thing of any such character can be purchased, obtained, or had; or who in

any manner knowingly hires, employs, uses, or permits any person to do or assist in doing, either knowingly or innocently, any act or thing mentioned above, is guilty of a misdemeanor and shall be punished by imprisonment in the county jail not exceeding one year or by fine not exceeding $1,000.00, both. A person who, after having been convicted of a violation of this section, thereafter violates any of its provisions, is guilty of a felony and shall be punished by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year or by fine not exceeding $10,000.00, or by both such fine and imprisonment.

• • • • •

(7) (a) The circuit court has jurisdiction to enjoin a threatened violation of this section upon complaint filed by the state attorney, county solicitor, or county prosecuting attorney in the name of the state upon the relation of such state attorney, county solicitor, or county prosecuting attorney.

• • • • •

(f) Every person who has possession, custody, or control of, or otherwise deals with any of the materials, matters, articles, or things described in this section, after the service upon him of a summons and complaint in an action for injunction brought under this section, is chargeable with knowledge of the contents and character thereof.

• • • • •

(10) For the purposes of this section, the test of whether or not material is obscene is: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

Office-Supreme Court, U.S.
FILED
MAR 26 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 718

GROVE PRESS, INC., a New York corporation, *Petitioner*,

v.

RICHARD E. GERSTEIN, as State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County, and WHELAN DRUG CO., INC., a Florida corporation, *Respondents*

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent's Brief in Opposition to the Petition for Writ of Certiorari herein suggests this Court should not take jurisdiction of the instant case under 28 U.S.C. 1257 (3). This reply is addressed solely to removing any doubt as to this Court's jurisdiction to review the

final judgment of the District Court of Appeal of Florida, Third District (hereinafter sometimes referred to as "appellate court"), entered on September 17, 1963. Said judgment was rendered by the highest court in the state of Florida capable of rendering a decision in the case at bar.

Respondent suggests that the question of Federal Constitutional protection for *Tropic of Cancer* and unconstitutional *application* of the Florida obscenity statute (F.S. 847.011) to that book, was not presented to, or passed upon by, the District Court of Appeal or the Supreme Court of Florida. In fact, however, Petitioner in its assignments of error and on brief and oral argument to the appellate court strongly urged the point (See Petitioner's Assignments of Error to the District Court of Appeal, grounds 4 and 5 set forth in Appendix A of this Brief; R. 286; Petition for Writ of Certiorari, pp. 7 and 8 and p. 2 at footnote 4. Hereafter said Petition is cited as "P."). The appellate court, after being ordered by the Supreme Court of Florida to do so (P. 8a), directly passed on the question: "The record discloses the chancellor approached the decision on a basis which was consistent with the standard previously announced by the Florida courts and with the tests set forth in the Roth and Day cases." (P. 3a). It is therein that the Florida courts erroneously and unconstitutionally *applied* the controlling law.

Petitioner did not submit the question to the Supreme Court of Florida, following the trial or appellate courts' decisions, because Petitioner had no right to review by the Supreme Court of Florida with respect to such question —under Article 5, section 4(2) of the Florida Constitution and Rules 2.1 (5) (a) and (b) of

the Florida Appellate Rules. Rule 2.1 (5) (b) defines the jurisdiction of the Florida Supreme Court over appeals from the District Courts of Appeal as follows:

> "(b) Appeals from district courts of appeal may be taken to the Supreme Court, as a matter of right, only from decisions initially passing upon *the validity of a state statute*, a federal statute or treaty, *or initially construing a controlling provision of the Florida or federal Constitution.*" (Italics added) (See Appendix B of this Brief)

Respondent indirectly confirms the correctness of this proposition, and thus also of the non-reviewability of the District Court of Appeal's decision, when it points out with reference to Rule 2.1 (5) (a), which deals with appeals from trial court decisions, that the Florida Supreme Court has jurisdiction to hear appeals "directly passing upon the validity of a state statute, . . . or construing the controlling provision of the Florida or Federal Constitution" (Respondent's Brief in Opposition, p. 3; see Appendix B of this Brief). Since Petitioner's challenge of unconstitutionality was by waiver and stipulation limited to an erroneous *application* of the statute to the literary work in question, any appeal to the Florida Supreme Court would have been improper.

The appellate court was not asked to, nor did it pass on the *validity* of the Florida obscenity statute, as distinguished from its *application* to a particular literary work (*Tropic of Cancer*). Neither did that appellate court construe a controlling provision of the Florida Federal Constitution. As the appellate court itself said in its opinion ". . . the question of validity

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[1] The distinction in Florida law between the *validity* of a statute and its *application* is clear. To attack a statute's *validity* is to seek to expunge that statute from the records. How-

of the statute was waived and the decision found not to involve constitutional construction[2] . . ." (P. 3a).

---

ever, to attack the *application* of a statute is to challenge the use of the statute only in a particular case with reference to the specific facts involved. The Supreme Court of Florida has stated as follows on this point:

> ". . . the decision that reached the District Court of Appeal was not one which would remove from the statute books or leave there the challenged law. The law would remain for application in all causes when that application would not, due to relevant circumstances, amount to transgression of constitutional guaranties. Had the Chancellor determined that the law itself was constitutional or unconstitutional irrespective of its application to pertinent facts the ruling would have been reviewable by direct appeal to the Supreme Court." *Stein* v. *Darby*, 134 So. 2d 232, 236, (Fla. 1961).

> "If the decree merely held the statute unconstitutional as applied to the appellees-plaintiffs under the facts of this case rather than invalid per se, then we do not have jurisdiction of this appeal." *Snedeker* v. *Vernmar Ltd.*, 139 So. 2d 682, 684 (Fla. 1962).

[2] The appellate court did not *construe* any provision of the U.S. or Florida Constitution, although the prevailing constitutional test, under "the *Roth* and *Day* cases" (*Roth* v. *United States*, 354 U.S. 476; *Manual Enterprises* v. *Day*, 370 U.S. 478), was applied through application of the Florida statute embodying that test to *Tropic of Cancer*. The Supreme Court of Florida has ruled on this point as follows:

> ". . . it is necessary that the final decree under assault actually construe, as distinguished from apply, a controlling provision of the constitution . . . We agree with those courts which hold that in order to sustain the jurisdiction of this court there must be an actual construction of the constitutional provision. That is to say, by way of illustration, that the trial judge must undertake to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision. It is not sufficient merely that the trial judge examine into the facts of a particular case and then apply a recognized, clear-cut provision of the Constitution". *Armstrong* v. *City of Tampa*, 106 So. 2d 407, 409 (Fla. 1958); see also *Snedeker*, *supra*.

This did not, however, serve to deprive Petitioner of its challenge to the unconstitutional *application* of the Florida obscenity statute. (See Appendix A, ground 5; P. 2 at footnote 1)

On appeal from the trial court, the appellate court transferred the case to the Supreme Court of Florida ". . . to determine the question of its jurisdiction . . ." (P. 6a) The Supreme Court of Florida agreed with Petitioner's position that, the *validity* of the statute not being questioned, jurisdiction on appeal was properly in the appellate court, and ordered the cause "transferred back" to the appellate court "for consideration and determination". (P. 8a and 2 at footnote 1). The force of the Supreme Court of Florida's Order and its previously cited rulings are determinative of the jurisdictional question raised by Respondent.

Petitioner properly presented and asserted at trial and on appeal to the District Court of Appeal that *Tropic of Cancer* was not obscene and that the Florida obscenity statute was unconstitutionally *applied* to *Tropic of Cancer*, because that work *could not be held obscene* under the *Roth* tests incorporated by the Florida statute. This point was never withdrawn by Petitioner who waived only his charge that the Florida obscenity statute was unconstitutional on its face. (See P. 2 at footnote 1; P. 5a at footnotes 2 and 3.).

The appeal was properly considered by the District Court of Appeal and no appeal could properly lie, before or afterward, with the Supreme Court of Florida. No further review to any higher Florida court being possible,[3] the decision of the District Court

[3] Respondent does not question, and Petitioner wishes to state, that *certiorari* to the Florida Supreme Court also does not lie in such a case (Florida Appellate Rule 2.1(5)(b)) (See Appendix B).

of Appeal that *Tropic of Cancer* was obscene, *applying* the *Roth* test of obscenity, was the final judgment rendered by the highest court of the State of Florida in which a decision could be had. *Karlin* v. *City of Miami Beach*, 113 So. 2d 551 (Fla. 1959) and 28 U.S.C. 1257 (3).

Respectfully submitted,

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Of Counsel

APPENDIX A

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY—IN CHANCERY

No. 61C 11673

THE STATE OF FLORIDA, EX REL RICHARD E. GERSTEIN, as State Attorney for the Eleventh Judicial Circuit of Florida in and for Dade County, Florida, *Plaintiff*,

-vs-

WHELAN DRUG CO., INC., a Florida corporation, and GROVE PRESS, INC., a New York corporation, *Defendants*.

Assignments of Error

The Defendant, Grove Press, Inc., hereby assigns as error to be relied upon in this appeal to the District Court of Appeal for the Third District of Florida, the following:

1. The Court erred since the Final Decree of this Court is against the manifest weight of the evidence.

2. The Court erred since the Final Decree is contrary to law.

3. The Court failed to ascertain and determine that the Statute under which the action can be brought was unconstitutional and in violation of the 1st and 14th Amendments of the Constitution of the United States of America.

4. The Court erred in find that the book, "Tropic of Cancer", was obscene in violation of the Defendants' rights under the 1st and 14th Amendments of the Constitution of the United States of America.

5. The Court erred in unconstitutionally applying the definition of obscenity set forth in the Florida Statutes involved herein in violation of the defendants' rights guar-

anteed under the 1st and 14th Amendments to the Constitution of the United States of America.

TOBIAS SIMON
Attorney for Defendant,
Grove Press, Inc.
706 Ainsley Building
Miami 32, Florida

I Hereby Certify that a true copy hereof was mailed this 23d day of November, 1962 to Shapiro & Fried, Esqs., attorneys for Whelan Drug Co., Inc., 407 Lincoln Road, Miami Beach, Florida and to Richard E. Gerstein, Esq., State Attorney, Dade County Court House, Miami 32, Florida, attention: George Orr, Ass't. State Attorney.

TOBIAS SIMON

APPENDIX B

Florida Appellate Rules

Rule 2.1

(5) *Jurisdiction of the Supreme Court.*

(a) Appeals from trial courts may be taken directly to the Supreme Court, as a matter of right, only from judgments imposing the death penalty, from final judgments or decrees passing directly upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal Constitution, and from final judgments or decrees in proceedings for the validation of bonds and certificates of indebtedness. The Supreme Court may directly review interlocutory orders or decrees passing upon chancery matters which upon final decree would be directly appealable to the Supreme Court. In all direct appeals and interlocutory appeals, the Supreme Court shall have such jurisdiction as may be necessary to complete determination of the cause on review.

(b) Appeals from district courts of appeal may be taken to the Supreme Court, as a matter of right, only from deci-

sions initially passing upon the validity of a state statute, a federal statute or treaty, or initially construing a controlling provision of the Florida or federal Constitution. The Supreme Court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, and may issue writs of certiorari to commissions established by law.

The Supreme Court may issue writs of mandamus and quo warranto when a state officer, board, commission, or other agency authorized to represent the public generally, or a member of any such board, commission, or other agency is named as respondent, and writs of prohibition to commissions established by law, to the district courts of appeal, and to trial courts when questions are involved upon which a direct appeal to the Supreme Court is allowed as a matter of right.